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WILLIE H. SMITH, Appellant)	
)	
and)	Docket No. 04-2270
)	Issued: April 13, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Gary, IN, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

On September 17, 2004 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated January 8, 2004 wherein the Office determined that appellant was not entitled to compensation for disability for the period January 7 to July 7, 2002 as a result of his work-related lumbosacral strain. Appellant also filed a timely appeal from the Office's June 4, 2004 decision denying his request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying appellant's request for an oral hearing.

The issues are: (1) whether appellant is entitled to compensation for disability for the period January 7 to July 7, 2002 as a result of his work-related lumbosacral strain; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

On December 6, 2001 appellant, then a 53-year-old maintenance mechanic, filed a traumatic injury claim alleging that on June 27, 2001 he was in a work-related accident and sustained an injury to his back. He was off work from July 1 through November 11, 2001. By letter dated December 21, 2001, the Office accepted appellant's claim for lumbosacral strain.

Appellant returned to work in a light-duty position on November 12, 2001 with the following restrictions:

“Lifting/carrying continuous 0 [to] 10 [pounds], intermittent 10 [to] 20 [pounds] 8 [hours per day]; intermittent standing, climbing stairs, kneeling, bending/stooping, twisting, pulling/pushing [and] fine manipulation 4 [hours per day]; intermittent walking 8 hours/day [and] reaching above shoulder 6 [hours per day].”

These restrictions were also renewed on numerous occasions.

Appellant submitted various reports to the Office on January 2, 2002 regarding his progress. In a report dated November 9, 2001, appellant's physician, Dr. Adolphus A. Anekwe, an internist, indicated that appellant was seen by him for lumbosacral sprain resulting from a motor vehicle accident at work. He noted that appellant was totally incapacitated from work July 17 until November 11, 2001. Dr. Anekwe indicated that appellant's prognosis was good with continued use of his medications. In an attending physician's report dated November 30, 2001, he indicated that appellant was partially disabled commencing November 12, 2001. On November 30, 2001 Dr. Anekwe completed a duty status report indicating that appellant could, *inter alia*, perform the following tasks intermittently for 4 hours a day: stand, climb stairs, kneel, bend, twist, push, pull and do fine manipulation; he indicated that appellant could lift above his shoulder intermittently for 6 hours a day, lift 10 pounds continuously and 20 pounds intermittently for 8 hours a day, and could do intermittent walking and simple grasping 8 hours a day. Forms with similar restrictions were submitted dated November 30, 2001 January 3, April 26 and June 21, 2002.

On November 3, 2003 appellant filed a claim for disability benefits from January 7 to July 7, 2002. The employing establishment controverted appellant's claim, noting that it had no medical documentation to support total disability during this time period.

In a report dated February 25, 2002, Dr. Anthony A. Anigbo indicated that, although appellant complained that his “back is messed up,” the doctor was unable to tell exactly how. He indicated that appellant was able to walk without much difficulty.

By letter dated December 1, 2003, the Office advised appellant that there was no medical documentation on file to support that appellant could not work as a result of his June 27, 2001 injury during the period January 7 to July 7, 2002 and suggested that appellant submit further information.

By decision dated January 8, 2004, the Office denied appellant's claim for compensation on the grounds that the submitted evidence failed to establish that the period of wage loss claimed resulted from the accepted condition.

By form dated April 7, 2004 and postmarked April 8, 2004, appellant requested an oral hearing. By decision dated June 4, 2004, the Office denied appellant's request for an oral hearing as it was not timely filed. The Office further denied the request finding that the issue could be equally well addressed through reconsideration before the Office.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that an employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

ANALYSIS -- ISSUE 1

In the instant case, appellant has submitted no evidence that he sustained a recurrence of disability during the period January 7 to July 7, 2002. In fact, at that time appellant's limited-duty restrictions matched the restrictions as set forth by his treating physician, Dr. Anekwe. There is no medical evidence in the record that established that appellant could not perform his limited-duty work. Although Dr. Anekwe reported that appellant was totally disabled during the period July 17 through November 11, 2001, for which he was compensated, he does not address the claimed period of disability, January 7 to July 7, 2002. Further, Dr. Anigbo provided no opinion supportive of an employment-related disability. Similarly, there was no evidence that the requirements of the job changed. The record supports the fact that the job duties remained the same. Accordingly, the Board finds that appellant failed to establish a recurrence of disability for the period January 7 to July 7, 2002 as a result of his work-related condition of lumbosacral strain.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Federal Employees' Compensation Act² concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."³

The Board has held that section 8124(b)(1) is "unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if

¹ Wilfredo Carrillo, 50 ECAB 99 (1998).

² 5 U.S.C. § 8193.

³ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

the request is filed within the requisite 30 days.⁴ Even where the hearing request is not timely filed, the Office may, within its discretion, grant a hearing and must exercise this discretion.⁵

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for recurrence by decision dated January 8, 2004. Appellant then requested an oral hearing before an Office hearing representative by form dated April 7, 2004, postmarked April 8, 2004. By decision dated June 4, 2004, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing as untimely and further denied the request finding that the issue could be addressed through the reconsideration process.

The Board finds that the Office properly determined that appellant's April 7, 2004 request for hearing was not timely filed as it was made more than 30 days after the issuance of the Office's January 8, 2004 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the case can be equally well addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which establishes that appellant was entitled to compensation. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for compensation for disability for the period January 7 to July 7, 2002. The Board further finds that the Office's Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

⁴ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 7 and January 8, 2004 are affirmed.

Issued: April 13, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member